No. ~~14,225~~
14676

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

v.

JOHN BLAZIN,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

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I.

STATEMENT OF THE CASE, JURISDICTION PLEADINGS AND PROCEEDINGS

A. Jurisdiction

Plaintiff and appellee, John Blazin, on September 15, 1952, was on the premises of appellant, Southern Pacific Company, at Oakland, California, working for the appellant as a yardman. He and other employees were engaged in moving a **Pullman Company**[1] car, the "Charlottesville" from

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1. All emphasis by bold-face type, whether or not it is in quoted material is ours.

track No. 34, where it had been for 14 days undergoing repair by The Pullman Company, to track No. 20 where additional repairs were to be made. During this move appellee attempted to board the car to uncouple it. It is his claim that he fell from the car because one of the grabirons was not in place. On November 16, 1953, he sued Southern Pacific Company for $31,800.00 damages. He claimed under the Coupler, Brake and Grabiron Act, Act of March 2, 1893, C 196, 27 Stat. at L. 531, § 4 (45 USC § 4) and under the Federal Employers' Liability Act (45 USC § 51 ff). The action was commenced in the United States District Court for the Northern District of California, Southern Division.

The jurisdiction of the court below was sustained by § 6 of the Federal Employers' Liability Act (45 USC § 56).

The case was tried in the court below, the court sitting with a jury, November 22 and 23, 1954. At the opening of plaintiff's case, **plaintiff** moved to strike defendant's plea of contributory negligence on the ground that this action was brought **solely** under the safety act. Defendant stipulated that the defense could be stricken, with the added stipulation that the plaintiff would not proceed under the Federal Employers' Act (R. 29, 30). All considerations of negligence on the part of the appellant or of contributory negligence on the part of the appellee were thus eliminated from the case. It was appellant's position, in support of which it undertook to make proof, that the facts did not bring the case within § 4 of the Act of 1893. The trial court ruled peremptorily against this position (R. 120ff; see p. 15 below.

The cause was submitted to the jury solely on the safety act, after the trial court had ruled as a matter of law, that that act applied (court instruction No. A-1 quoted p. 9 below). The jury returned a verdict for plaintiff in the

amount of $23,050.00 (R. 11). Judgment on the verdict was entered November 24, 1954 (R. 12).

On December 2, 1954, appellant served and filed its notice of motion for new trial (R. 13-15). The motion was heard on December 17, 1954, and was denied in a written opinion, December 29, 1954 (R. 16-23). Thereupon, and within the time allowed by law, defendant, the appellant, perfected this appeal, by notice of appeal filed January 24, 1955 (R. 23).

The jurisdiction of this court is sustained by 28 USC §§ 1291, 1294, 2107 and the Federal Rules of Civil Procedure, Rule 73.

B. Summary Statement of the Case

1. THE ACCIDENT

The car "Charlottesville" involved in this case had been withdrawn from service on September 2, 1952 (Welch, R. 127) and remained out of service until October 5, 1952 (Welch R. 127-131). During this period of time the car was under the control of The Pullman Company (Welch, R. 131) undergoing heavy repair work (Welch R. 133) in the nature of repainting, repairing, upholstery work, repairing electrical work, and repairs to certain mechanical features (Welch R. 127ff). The Pullman Company would withhold the car from being used in service until these repairs were completed (Welch, R. 131). From September 2 until September 15, 1952, this car was being repaired by The Pullman Company on track No. 34 (Welch R. 127ff). Track No. 34 is a repair track (Welch R. 119) in an area of the yard that is set aside for repairs (Moultin R. 112, Welch R. 119). On September 15 incident to further repair the car was moved from track No. 34 to track No. 20 (Blazin R. 92) a heavy repair track (Welch R. 128) in the repair area of the

yard (Moultin R. 112, Welch R. 119). Track No. 34 is a track used by The Pullman Company for the making of repairs (Welch R. 119) while track No. 20 is a repair track upon which the majority of the work is done by Southern Pacific Company (Welch R. 128). There is no evidence to indicate the exact nature of the repairs that would have been performed on track No. 20, however, we do know that the track is classified as a heavy repair track (Welch R. 128) and that the car was ordered into that track for heavy repair work (Welch R. 128) and we do know that The Pullman Company repairs grabirons (Welch R. 128).

There was no evidence of any kind, offered by the plaintiff or otherwise, that on the move from track No. 34 to track No. 20 the car moved or was expected to move over any revenue track or track used in conducting train movements or switching movements (except as an incident of handling cars that were out of service) or over any track except a track of the repair area.

Only three witnesses testified on the issue of liability, appellee Blazin, employed by the appellant as a yardman, Moultin also a yardman employed by appellant and who was called by the appellee, and Welch, a car foreman employed by The Pullman Company (Welch R. 118) who was called by the appellant.

There were no witnesses to the accident and appellee's testimony concerning it is undisputed. In narrative form his testimony is as follows (R. 35 ff):

On September 15, 1952, at about 11:00 o'clock a.m. the appellee was a member of a yard crew whose duty it was to move the car "Charlottesville" from track No. 34 to track No. 20. The car was standing on track No. 34 together with other cars. To remove it was necessary to pull 8 cars from track No. 34 onto lead track No. 28. The other cars in

this move were defective and bore bad order tags. (Blazin R. 137). The engine with the 8 cars coupled to it backed east out of track No. 34 onto lead track No. 28 and came to a stop. At that point the engine was to shove all of the cars west with the switch lined for track No. 28 and the car "Charlottesville" was to be cut free from the other cars and permitted to roll west on lead track No. 28 toward track No. 20. Just as the move started west on track No. 28 Blazin stepped aboard the "Charlottesville" to uncouple it from the other cars. He got on the right side in the direction of westward-motion at the trailing end. He placed both feet on the lower vestibule step of the car and took hold of the grabiron on the lefthand vestibule post with his left hand and reached for the grabiron on the right hand vestibule post just as the cars started to move. The grabiron on the righthand vestibule post was missing and Blazin fell from the slowly moving car and was struck in the back by the car immediately behind the car "Charlottesville". Had the grabiron on the right hand vestibule door been present Mr. Blazin would have held on to that iron with his right hand while taking hold of the cutting lever with his left hand to separate the car "Charlottesville" from the other cars. (Blazin R. 44).

At the time of the trial appellee was 29 years of age. He had been employed by appellant since May of 1946 in various capacities. His gross earnings were approximately $430.00 a month and his take-home pay was about $350.00 per month. (Blazin R. 47).

2. THE INJURIES

Following the accident Mr. Blazin worked for 3 or 4 days (Blazin R. 45). He then laid off work and was off until November 18, 1952, with complaints of back pain (Blazin

R. 45ff). He then worked from November 18, 1952, until September 22, 1953. On the latter date while throwing a switch his back tightened up and he again laid off work and with the exception of two or three days was off work continually until February 1, 1954. (Blazin R. 49ff) In May of 1953, while getting off a car he felt a pain in his groin and a hernia operation was performed on him in December of 1953. There was no hernia present when the appellee was examined by Dr. Fisher in October of 1953 (R. 82). Dr. Fisher was called by the plaintiff and appeared and testified in his behalf. Since his return to duty on February 1, 1954, appellee has worked without taking any appreciable amount of time off (Blazin R. 51).

C. The Pleadings

The pleadings are not significant. The complaint (R. 3-6) was typical for an action of this sort. It sets forth the corporate existence of the defendant and the nature of its business as a common carrier by railroad in interstate commerce and that it operated in the City of Oakland, County of Alameda, State of California. Paragraph III of the complaint reads as follows:

> "This action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., and the Federal Safety Applicance Act, 45 U.S.C.A., Sec. 1, et seq."[2]

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2. The safety act does not provide any remedy for violation. If a party is entitled to its benefits he must seek his remedy under appropriate state law or under the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 US 205, 210, 78 L ed. 755, *Tipton v. Atchison T. & S. F. Ry. Co.*, 298 US 141, 147, 80 L ed. 1091. In the latter case referring to an earlier case that had caused some confusion the court stated:

> "In *Texas & P. R. Co. v. Rigsby*, 241 U.S. 33, 60 L. ed. 874, 36 S. Ct. 482, it was decided that, as the first Safety Appliance Act had been extended by later legislation to equipment used

The complaint alleges the time and place of the accident and the employee status of the appellee followed by the allegation charging violation of the safety act setting forth that the violation was the proximate cause of the injuries sustained, alleges damage generally in the amount of $30,000.00 and specially in the amount of $1,800.00 and prays for judgment in the amount of $31,800.00.

The answer (R. 7-11) admits the corporate existence of the defendant and that it was a carrier engaged in interstate and intrastate commerce in the City of Oakland, County of Alameda, State of California. It admits that on September 15, 1952, plaintiff was employed by appellant as a yardman in the City of Oakland. It further admits that at the time and place the passenger car was being switched and that the car was not equipped with a vestibule handhold on the right side of the vestibule entrance at the B end and further admits that at that time and place the plaintiff made a claim that he had been injured. Appellant denied the other affirmative allegations of the complaint and set up as defenses contributory negligence and sole proximate cause.

Contributory negligence is not a defense under the safety act. It was set up here because of the possibility that appellee had stated a cause of action in negligence under the Federal Employers' Liability Act. Any question in this regard was resolved by the stipulation referred to on page 2 above.

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in intrastate transportation upon a railroad which is a highway of interstate commerce, an employee injured as the result of a violation of the act, in respect of a car so used, is entitled to recover for breach of the duty imposed on the carrier. Nothing more was there adjudicated."

D. Ruling of the Trial Court Here for Review

The issues here and the matters about which they revolve can be briefly stated:

As previously stated appellant claims under the Coupler, Brake and Grabiron Act, Act of March 2, 1893, C. 196, 27 Stat. at L 531, § 4 (45 USC § 4) which reads as follows:

> "That from and after the first day of July, 1895, until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

1. After the conclusion of plaintiff's case appellant made an opening statement (quoted p. 11-ff below) in which it was pointed out that the defense to the action would be that the car "Charlottesville" was not in use within the meaning of the act. Following the opening statement appellant's first witness was sworn and before any evidence could be elicited on this the court ruled as a matter of law that it did not intend to entertain such a defense (see specification of error p. 15 below). This ruling eliminated an entire line of testimony in connection with the question of "use" of the involved car.

2. At the conclusion of the evidence the court took from the jury the question of the applicability of the safety act and instructed as a matter of law that that act applied (see specification of errors below, p. 9).

3. Finally, there is a question whether the award was not so excessive that the trial court abused its discretion in unconditionally denying appellant's motion for a new trial and that this court should give relief.

It is believed that the foregoing statement of the question, in general form, when taken with the specification of errors, will sufficiently indicate what we propose to argue.

II.

SPECIFICATION OF ERROR RELIED UPON

1. The court below erred in instructing the jury, Court Instruction A-1 (R 171, 179), that the Safety Appliance Act applied as a **matter of law.** It erred in that as matter of law the Act did not apply and if we are wrong as to this, erred in taking from the jury a question of fact, namely, whether or not the car was under repair, out of service and not in use within the meaning of said Act.

This instruction is as follows:

> "The Safety Appliance Act, of which we have been speaking during the course of this trial, required under the facts of this case, that the car, the Charlottesville, be equipped with secure grab-irons. The defendant company admits that the Charlottesville was not equipped with a right-hand grab-iron. The **sole** question you must determine in deciding whether or not the defendant is liable is this:
>
> Did the absence of the grab-iron approximately cause or contribute to the plaintiff's injury?
>
> If you find that it did, you must find for the plaintiff. If you find that it did not, you must find for the defandant.
>
> Since the defendant had an absolute duty to furnish the grab-iron, **you must not concern yourselves with the presence of absence of reasonable care on the part of either the defendant railroad or the plaintiff.** There has been some talk about the Federal Employers Liability Act. You should disregard that entirely. I repeat, the

sole question you should consider in determining whether or not the defendant is liable is the question I have previously related to you:

Did the absence of the grab-iron proximately cause or contribute to the plaintiff's injury?"

At the trial error was assigned (R 177-179) as follows:

"Mr. Boyd: * * *

"Now, as to the instructions,—probably due to my absence—but this new instruction which Your Honor proposed, which has no number, starting with "The Safety Appliance Act required under the facts of this case that the Charlottesville be equipped with * * * grab-irons * * *", Your Honor, I except on the grounds that it takes from the Jury entirely the question as to whether or not this car was in use or whether it was under repair. Now, I don't believe that the matter was taken up by Your Honor this morning and I felt—

The Court: Well—pardon me, I didn't mean to interrupt you but I think that the Court expressed itself rather clearly on that subject this morning. In other words, I took the position that the Safety Appliance Act, first of all, applies. This is a yardman; the car was being shunted or kicked onto the track. Whether for purposes of repair or refurbishing or not, I think the car was still in interstate commerce while it was being shunted or kicked onto that track. I believe that the Safety Appliance Act is designed, construing it liberally, [205] to protect a workman in just such circumstances, and I thought that I had explained that rather fully to Mr. Messner. I presume he didn't have an opportunity to tell you personally.

Mr. Boyd: No, Your Honor. But I want to make clear for the record that we object to this instruction because this instruction—of course, it is consistent with Your Honor's previous position taken this morning—does withdraw from the Jury entirely whether the

Safety Appliance Act applied. That is a matter of law that the car was in use on the lines, we except to, the instruction on that ground, that it is an instruction that as a matter of law the question of whether or not the car was under repair is not before the jury.

So that we may be clear in the record, Your Honor, I agree, Your Honor, that the instruction is consistent with Your Honor's ruling, but we want to make an exception to that instruction.

The Court: The exception will be noted.

Mr. Boyd: That is the instruction Your Honor gave. It has no number. It begins "Safety Appliance Act required * * *" and ends "* * * if you find for the plaintiff on this issue you should then consider the question of damages." To that we except.

The Court: For your records, let it be noted 'A-1'.

Mr. Boyd: Court's instruction 'A-1'.

The Court: Yes."

2. The trial court erred in ruling that it would not entertain the defense the car "Charlottesville" was not in use within the meaning of the safety act and excluding evidence on this issue which defendant proposed to introduce. After the plaintiff had rested defendant made an opening statement as follows (R 116-121):

"Mr. Messner: If the Court please, Mr. Nichols, ladies and gentlemen of the Jury, at this stage of the proceedings the defense counsel has an opportunity to tell you what he thinks the proof is going to be, and what is going to be shown by the remainder of the evidence in the case. From here on the case will be rather brief.

We believe that in the first place that this action is brought on the Federal Safety Appliance Act. As His Honor has already told you, that this is the act that imposes absolute liability on the character—[sic—carrier].

A Juror: We can't understand it.

Mr. Messner: (Continuing) ——imposes absolute liability on the character [sic—carrier], where the cars that are in use on its lines are not equipped in accordance with certain specifications.

Now, by the pleadings we have admitted that the car in question was not so equipped. **The only remaining question is, whether or not this car was in use on our lines within the meaning of the Safety Appliance Act.**

We believe that the evidence has already shown that the car was in a repair area in the yard. And, I believe, that you will recall that the evidence has shown that the car was out of service, it was not in use in interstate commerce within the meaning of the act. We believe the evidence will show that the car, Charlottesville, **had been withdrawn from service by the Pullman Company who owned the car** as distinguished from the Southern Pacific Company some two weeks before this accident occurred. And that the car was placed on Track No. 34 in what is known as the Passengers Yard, West Oakland. And the car which was placed there for the purpose of being **generally refurbished and overhauled.** We believe the evidence will show that during the course of these repairs, which consisted of repainting, reupholstering and other items of repair to modernize the car. During the course of those repairs it was necessary, and the car was moved from Track No. 34 down to Track No. 20, where certain other repairs were to be made, and were, in fact, made. Thereafter the car was returned to Track No. 34 and on October 5, twenty days after this accident, the car was then returned to service and put in use on the lines of the Southern Pacific Company. We believe that that is what the evidence will show.

Now, there has been claim here in connection with certain injuries. There was an accident on September 15th, 1952, and that is the only accident that is the subject of this lawsuit. We believe that the evidence

has already shown that there was an accidental injury on September 22nd, 1953. There was something said about a hernia in May of 1953. We believe the evidence has already shown from Dr. Fisher that that hernia was not in existence of October, 1953. We believe that the evidence will show that Mr. Blazin was examined later by a Dr. William Sheppard, Oakland orthopedic surgeon.

Well, rather than tell you what that evidence will show I will have the Doctor in here and he will tell you what he found, and he will give you his conclusions and opinions in connection with Mr. Blazin's health.

I believe that that substantially is what the evidence for the balance of the trial will show, ladies and gentlemen.

Thank you.

WILLIAM J. WELCH

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you state your name and occupation for the Court and Jury?

The Witness: William J. Welch, foreman for the Pullman Company in Oakland.

Direct Examination

Mr. Messner: Q. Mr. Welch, how long have you been employed by the Pullman Company in Oakland?

A. I have been with them over nineteen years, sir.

Q. Now, you do not work for the Southern Pacific Company, do you?

A. No, sir.

Q. Now, what has been your place of employment during these nineteen years that you have worked for Pullman Company?

A. I worked the entire time in the Oakland yard, sir.

Q. Now, September 15th, 1952, Mr. Blazin, who was the plaintiff in this action was injured in Oakland, West Oakland Yard; were you a witness to that accident?

A. No, sir, I wasn't.

Q. Are you familiar, generally, with the tracks in what is known as the Passenger Yard of West Oakland?

A. Yes, sir.

Q. Are familiar with the track that is known as Track No. 34?

A. Yes, sir.

Q. In your job as foreman with the Pullman Company, do you or do you not have charge of the repairs to cars, pullman cars, that come into West Oakland Yard?

A. Yes, sir, I do.

Q. And do you have occasion to make repairs on Track No. 34?

A. Yes, sir, quite often. We make repairs there.

Q. Do you make repairs on Track No. 32?

A. Yes, sir.

Q. You make repairs on Track No. 36?

A. Yes, sir.

Q. Now, in September of 1952, did your company have a program afoot for modernizing and refurbishing cars?

Mr. Nichols: I object to that as incompetent, irrelevant, and immaterial. I, in my opening statement, was going to make a showing that this car had no bad order on it, no bad order sign, and Counsel objected to that. He said that I was without an issue. That negligence was not a matter of issue, limited entirely to the Safety Act. Now, in view of that statement, the defense that he is attempting here, this car was not in service, just doesn't *ly* under the act. If the Court please, the car that was under repair, and to say that the car—that the plaintiff was not working under the provision of the act.

The Court: Do you wish to be heard?

Mr. Messner: If the Court please, and I think perhaps it is a matter—I don't know whether it should be taken up in the presence of the Jury or not.

The Court: It is a matter that I want to take up in the absence of the Jury.

You may be excused for a few minutes, ladies and gentlemen.

(Whereupon the Jury left the Courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: I want to say first of all that **I have anticipated this matter.** And my views on this particular phase of the case are as follows:

Whether or not this car was in the Oakland yards for purposes of repair or not makes no difference in the opinion of this Court. The Safety Appliance Act was designed by Congress to protect workmen and this man was working.

There were, apparently, no bad order indications or signs on the car, and whether there were or were not, Mr. Blazin, if he is to prevail here at all, is certainly entitled to the full coverage of the Safety Appliance Act as designed to give him. I don't think it makes any difference whatsoever whether it was in there for refurbishing or for repairs, it was still engaged in interstate commerce, was being readied for interstate commerce and was actually in interstate commerce. And I hold that actually as a matter of law.

Mr. Messner: Well, if the Court please, there have been numerous decisions, various appellate court in connection with this matter.

The Court: That is my decision, just what I have said.

Mr. Messner: If that is the decision of Your Honor, there is no use of pursuing the matter.

The Court: **Not a particle because I don't intend to entertain that sort of a defense.**

3. The court erred, and abused its discretion in denying appellant's motion for a new trial, upon the ground that the damages awarded were excessive in fact, and as a matter of law, that the award, as to amount, is not supported by the evidence and was the result of passion and/or prejudice. (R. 13-23.)

III.

ARGUMENT

The first two assignments of error, i.e. the ruling excluding evidence and the court's peremptory instruction that the safety act applied as a matter of law, are so closely related that argument upon one point must of necessity bear upon the other. In fact it might be reasonably said that the court's ruling that it would not entertain appellant's defense as a practical matter amounted to the same thing as the subsequent peremptory instruction for the exclusion of all evidence on an issue as surely excludes that issue from the case as an instruction directing that the issue not be considered. Indeed, it goes deeper for it prevents the party ruled against to make a record which would show a fact question. The court excluded proof, as offered in the opening statement **in the language of the statute,** that the car was not in **"use"**.

In the written order denying appellant's motion for a new trial (R. 16ff) the court stated in part as follows:

> "2. Applicability of the Safety Applicance Act.
>
> At the close of all the evidence, I took from the jury the question of the applicability of the Safety Appliance Act and instructed that if the admitted absence of the grabiron caused the plaintiff's injury, the jury should find for the plaintiff. During the course of the trial I excluded certain evidence, but I believe that the defendant presented the crux of its case on this point, perhaps in not as dramatic or full sense as it desired,

but the skeleton was clearly defined. Defendant contends the instruction was error."

The statute in question, quoted in full on page 8 above, stated in part, "It shall be unlawful for any railroad company to **use any car** in interstate commerce" etc. The language of this provision is: To violate the statute the carrier must "use" the car. Defendant sought to introduce evidence to establish that the car "Charlottesville" was undergoing a course of repair in a repair yard and that while the car was in this status it was "out of service" and not in "use" within the meaning of the act. Immediately after appellant made its opening statement announcing what its defense would be and before any evidence had been introduced as to the status of the car the court ruled that it would not entertain the defense that this car was not in "use". In referring to the defense in his written opinion the court states: "The skeleton was clearly defined". The appellant believes that in view of the clear language of the statute that it was entitled to submit evidence fully upon this point and that after such evidence had been presented, and if at that time there was contrary evidence, the question of "use" would be one for the jury. However, if there was no contrary evidence and it was shown that the car was not in "use" appellant would then have been entitled to a peremptory instruction that the safety act did **not** apply.

Not only was this evidence excluded but there was no evidence, introduced by the plaintiff responsive to his burden of proof, that the car "Charlottesville" was not undergoing a course of repair. There is abundant evidence that the involved tracks are in a repair area of the yard. Indeed, appellee's counsel in his opening statement (R. 31) states, "and then they have another track that feeds off into a number of—not feeder tracks, but tracks where they permit

the cars to remain when **not in use.** Storage tracks, I think they are called." Appellee himself testified concerning the tracks on direct examination as follows (R. 38):

"Q. And when a Pullman car is **not in use** is that where it is placed?

A. **That's right.**" (R. 38)

Appellee's witness Moultin testified (R. 112), "All tracks over there in the Southern Pacific are repair tracks in this area."

The nature of the tracks upon which the car "Chorlottesville" was moved is an important consideration. If all of the tracks involved are repair tracks then car movements made on such tracks, incident to repair, would not be "use" of the car within the meaning of the statute. (*Kaminski v. Chicago, Etc. R.R. Co.,* 180 Minn. 519, 231 NW 189, (cert. den.) 282 US 872, 72 L ed. 770 (1930).) This repair area of the yard is analogous to a shop where automobile repairs are made. During the course of repairs to an automobile it may be necessary to move it from a rack upon which wheels are aligned, to another point in the shop where motors are overhauled and thence again to a lubrication pit. Such movement would be made, incident to and to facilitate the repairs. No one would be so bold as to suggest that an automobile in a shop for repairs should meet the same safety standards as an automobile that is in use upon the highways. Safety statutes for automobiles governing their brakes and lights etc., would not apply to a vehicle in a shop being prepared and repaired to meet those standards. The only difference between a shop for automobiles and a repair yard for freight cars is that the freight cars require a larger area because of the difference in size of the vehicles and the freight cars can be moved only upon rails. The determining factor in the character of a track is not the

name that is given it but the use to which it is put. Mr. Welch testifies that the tracks are used for repairs (R. 119, 128). Mr. Moultin testifies that all of the tracks in this area are repair tracks (p. 18 above). Appellee concedes with some reluctance that these are tracks where cars are worked on and that the term "storage track" is nominal rather than descriptive (R. 93-94).

"Q. Now, when you say storage track you mean it is a track, that is the name of a nominal thing that you refer to as a storage track is that right?

A. That's right.

Q. Do you know what those tracks are used for?

A. To store the cars.

Q. Do you know what is done with the cars while they are stored, or doesn't your experience go that far?

A. They are cleaned to be ready to go on their next trip.

Q. They are maintained and cleaned and repaired, is that right?

A. Well, I don't know just what the repair men do, I know they are cleaned.

Q. You know they are worked on?

A. That's right."

The testimony from all of the factual witnesses in the case establishes that the tracks involved were in a repair area of the yard and were used for repair purposes.

In *Kaminski v. Chicago, etc. RR Co.,* supra, at page 190, the court stated:

"We understand these cases to hold that, although a car with defective appliances is being moved for the purpose of taking it out of service and placing it at the point where it is to be repaired, it is within the operation of the Safety Appliance Act during such movement. But we have been cited to no case and know of

> none which goes to the extent of holding that a car with defective appliances which has been **taken out of service and has been placed on a repair track to be repaired** in a yard used exclusively for the purpose of making repairs, and which is **actually in process of being repaired,** is still within the operation of the Safety Appliance Act."[3]

The only testimony concerning the status of the car is from Welch. In summary form his testimony (R 127) is that the car was placed on track No. 34 on September 2, [1952] and remained in this yard until released for service on October 5, 1952. During that period of time it was undergoing what is characterized as "heavy work" (R 133). In the *Kaminski Case* the court stated, at page 191:

> "We reach the conclusion that, where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car **made in the course of the work and for the purpose of facilitating it** are not within the operation of the Safety Appliance Act."

See also the syllabus by the court in *Netzer v. Northern Pacific Ry. Co.,* 238 Minn. 416, 57 NW2d 247, 248 (1953).[4]

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3. The *Kaminski Case* is under the same statute as the one under which appellee claims the involved car was being moved from one track in the repair area to another track for further repairs. Plaintiff was a switchman assisting in the moving of the cars. As he attempted to board the involved car a grabiron pulled off because the bolts on the inside of the car had been burned off with an acetylene torch incident to repair. Plaintiff fell and was injured. The court held that the car had been withdrawn from service and was not within the operation of the safety appliance act.

4. The *Netzer Case* is under 45 USC § 11 in which an employee fell from a car standing on a repair track. This court held that the car was not being "used" within the provisions of the safety act.

The case contains an excellent discussion concerning all of the

To bring himself within the coverage of the safety act the appellee must establish not only that the defect existed but that the car was in "use" within the meaning of the act. (*Myers v. Reading Co.*, 331 US 477, 91 L ed. 1615.)[5]

The word "use" as it appears in the act must be given meaning. The exact wording is "to use any car in interstate commerce". We can fairly assume that this language means at least use in some sort of commerce or to put the car to some commercial use. During the course of repairs a car

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cases in point and distinguishes those that are not in point.

"*Syllabus by the Court.*

"1. Federal Safety Appliance Act, 45 U.S.C.A. § 11, which makes it unlawful for a common carrier to permit to be used on its line any car not equipped with efficient hand brakes, has no application to car removed from train and placed on track for the specific purpose of having repairs made thereto.

"2. Cases cited in support of contrary view involve accidents which occurred while car was being switched in the yards; or while it was in process of being removed to a repair track; or while it had been placed on a siding as distinguished from a repair track and, hence, had not yet been removed from *use* on lines.

"3. Fact that defective car was loaded with merchandise and consigned and previous to removal to repair track for repair had been part of freight train *held* not controlling on question whether § 11 of the Federal Safety Appliance Act is applicable. Governing factor which prevents application of act is removal of car from use on line to repair track for purpose of repair." (Italics in original material.)

5. In the *Myers Case* a verdict was found in favor of the plaintiff. Defendant's motion to set aside the verdict was granted. The question was whether there was evidence from which the jury could infer that a hand brake was inefficient and thus violated 45 USC § 11. The court found that there was sufficient evidence and stated:

"* * * A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which cause the injuries was on a car which the railroad was **then using on its line**, in interstate commerce, and that the brake was not an 'efficient' hand brake. * * *"

is not serving any useful purpose and it cannot be put to the use for which it was intended. While in the repair process it is a liability or a detriment to the carrier and only upon completion of the repairs can the car be returned to useful service or use in commerce. Repairs are prior and precedent to use. They are restorative in character and are designed to permit subsequent use. Only by repair process can the carrier comply with the statute. The "use" requirement in the statute is a limitation on the absolute liability imposed by it to permit compliance. *Baltimore & Ohio R. Co. v. Hooven,* 297 Fed. 919, Circ. 6, 1924:[6]

> "The act forbids the 'use' or 'hauling on its line' of prescribed cars. Whatever ambiguity lies in the statute results from the susceptibility of the term 'use' to an interpretation equivalent in meaning to the terms 'employ' or 'engage,' or the phrase 'habitually use,' as distinguished from the term 'use' as implying actual present use. Having in mind the broad aims and purpose of the statute and its specific provisions, we think there can be no doubt as to the meaning of its prohibitory clause. The statute imposes an absolute liability on the carrier to equip its vehicles with safety appliances and to keep such appliances secure. **The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law, and are not in our judgment acts which the law intends to penalize.** The process of conditioning an engine and preserving it from deterioration through rust by spraying it with oil appears to be, so far as this record is concerned, the usual and

6. The *Hooven Case* is under 45 USC § 11 and deals with a locomotive which was standing in the roundhouse. An employee slipped and fell because the grabirons of the locomotive were covered with oil. The court held that the statute had no application because the equipment was not being used on its lines within the meaning of the act.

necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

"* * * Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act (Comp. St. § 8630 et seq.) and related statutes. Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute."[7]

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7. *Brady v. Terminal R. Asso. of St. Louis,* 303 US 10, 13, 82 L ed. 614. This is a case in which the involved car had not yet reached the point of repair. However, in its opinion the Supreme Court cites with approval *Baltimore & O. R. Co. v. Hooven,* supra, and *New York C. & St. L. R. Co. v. Kelly,* infra:

"* * * The 'use, movement or hauling of the defective car, within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago G. W. R. Co. v. Schendel,* 267 U.S. 287, 291, 292, 69 L. ed. 614, 617, 45 S. Ct. 303. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. **It is not a case where a defective car has reached a place of repair.** See *Baltimore & O. R. Co. v. Hooven* (C.C.A. 6th) 297 F. 919, 921, 923; *New York C. & St. L. R. Co. v. Kelly* (C.C.A. 7th) 70 F. (2d) 548, 551. **The car in this instance had not been withdrawn from use.**"

In considering this question of "use" the Seventh Circuit in 1949 in *Lyle v. Atchison, T. & S. F. Ry. Co.,* 177 F2d 221, cert. den. 339 US 913, 92 L ed. 1339, the court stated:

> "Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, **likewise limited the absolute liability to cars and locomotives while in use 'on the line.'** In other words, when a locomotive or car is in 'use on the line,' the mandatory duty of the carrier attaches **and when the car or engine is not so in use then the duty under the express provision of the statute does not exist.**
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> "* * * **To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it.** To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation."[8]

The fact that it was necessary to move the car "Charlottesville" did not return it to service and put it in "use" within the meaning of the act. **It could not be returned to service until released by The Pullman Company.** In the

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8. The *Lyle Case* involves an injury to an employee who brought his action under 45 USC § 23. He was injured while working on a locomotive standing in a roundhouse due to the presence of oil and grease on the steps and ladder of the tender. Defendant appealed from the judgment in favor of the plaintiff, urging that the locomotive was not in use within the meaning of the statute. The court reversed, and stated that the trial court should have directed a verdict for defendant. In accord, *Tisneros v. Chicago & Northwestern Ry. Co.,* 197 F2d 466 (Circ. 7, 1952, cert. den. 344 US 885, 97 L ed. 121); *Compton v. Southern Pacific Co.,* 70 CA2d 267 (1945) 161 P2d 40.

case of *New York C. & St. L. R. Co., v. Kelly,* 70 F 2d 248, 550 (Circ. 7, 1934), cert. den. 293 US 595, 79 L ed. 689, the court stated:

> "After a defective car **reaches the place of repair,** the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act, **nor does mere shifting of cars within the place of repair put the car 'in use'** within the meaning of the statute. [Citing cases]
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> "* * * Had the car in question been en route to the repair place, a different situation would have been presented, **but after it reached the repair place,** was out of service, the carrier was entirely within its rights in **taking off the handhold** or any other of the safety appliances necessary to effect the repairs, without violating the Safety Appliance Act."[9]

Two earlier cases also appear to be in point in connection with the movement of the car. *Siegel v. New York Cent. & H. R.R.R.,* 178 Fed. 873, 876 (Circuit Court M.D. Penn.,—1910) said:

> "* * * that the necessary movement of a defective car by itself, for the purpose of repair only, and not in conjunction with cars commercially used, does not subject the carrier to the penalties of the law. Repair shops, as it is pertinently said, cannot be kept on wheels; and a carrier may therefore move one or more defective cars by themselves to such shops, for the purpose of

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9. The *Kelly Case* is brought under 45 USC § 11. Plaintiff, a brakeman, was switching cars on a repair track. The engine entered the repair track with interstate cars attached to the engine and unintentionally moved the involved car which was standing on that track. The plaintiff climbed up the ladder to set the brake on the car and as he reached for the top grabiron he fell because it was missing, and was injured. At the trial, there was a verdict in favor of plaintiff. The court reversed, and stated, "Since it is so clear that the car was not in use, it was erroneous to submit the case to the jury." (See footnote 7 above.)

having them put in a condition to conform to the requirements of the safety appliance acts, provided such cars are excluded from commercial use themselves, and from connection with other cars which are being used commercially."

Note also the language of the court in *Southern Railway Co. v. Snyder,* 187 Fed. 492, 497 (Circ. 6,—1911):

"While a carrier may move empty cars by themselves to repair shops for the purpose of having them placed in condition to comply with the safety appliance acts, without being guilty of a violation of those acts while engaged in an honest effort to meet their requirements, yet the cars, in any movement for the purpose of repairing them after they so become defective, must, in order not to be subject to the act, be wholly excluded from commercial use themselves and from other vehicles which are commercially employed."

Note also the language of *Sherry v. Baltimore & O. R. Co.,* 30 F2d 487, 488 (Circ. 6, 1929) cert. den. 280 US 555, 74 L ed. 611:

"* * * It will therefore be noted that not only is absolute liability independent of negligence conditioned upon **use** of defective equipment by the defendant, but that the abolition of the defense of assumption of risk is similarly effective only when the defective equipment is *in use* contrary to the provisions of statute."[10] (Emphasis by italics is the court's.)

Appellee failed to bring his case within the provisions of the safety act in that he did not establish that the car

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10. This is an action under 45 USC § 11. The injured employee was a car inspector who was injured while attempting to operate the brake on a car that was standing on a ladder track. It was the employee's duty to inspect the car and determine what repairs would be necessary. The court held that the car was not in use within the meaning of the statute.

"Charlottesville" was in "use". He failed to establish that the car was not under repair; he failed to show that the tracks were not repair tracks or that the involved tracks were revenue or commercial tracks; he failed to introduce any evidence that the car "Charlottesville" was at any time used in commerce either before or after the accident. All of these things are determinative of "use" of the car within the meaning of the statute and failure to establish this element is failure to make a prima facie case.

It is appellant's position that because there is no proof of "use" of the car that it should have been entitled to a peremptory instruction that the act did **not** apply as a matter of law. Under these facts, at the very least, the appellant was entitled to have the questions of fact concerning the nature of the tracks and the status of the car determined by the jury. (*Gunning v. Cooley,* 281 US 90, 94, 74 L ed. 720; *Tennant v. Peoria & P.U.R. Co.,* 321 US 29, 35, 88 L. ed. 520; *Lavender v. Kurn,* 327 US 645, 90 L. ed. 916; *Tiller v. Atlantic Coast Line R. Co.,* 318 US 54, 87 L. ed. 610.)

A jury question was presented even though the trial court in its ruling excluded the major portion of appellant's evidence in connection with the defense that the car was not in "use."

All of the cases cited by appellant concerning the repair of equipment and determination of its "use" and the very language of the statute itself indicate that the defense urged by the appellant was a proper one and evidence concerning it should have been admitted (Fed. Rules Civ. Proc., Rule 43 (a)).

The lower court, with deference, in a case of claimed liability under a statute imposing absolute liability but conditioning it upon "use" of the car in question mistakenly applied the interstate commerce test of the Federal Employers' Liability Act where the duty is less rigorous, liability is

imposed only for negligence and contributory negligence is a partial defense in reduction of damages. Under this latter statute it is enough to show that repair work furthers interstate commerce (*So. Pac. Co. v. I.A.C.*, 19 C2d 271, 120 P2d 880). There is no requirement that the car be in use. The question is not whether the car was in use in interstate commerce in the constitutional sense (as the lower court seemed to think a question under the FELA) but whether it was in "use" within the statutory sense of 45 USC § 4.

The cases in which application of the safety act was proper have not been cited to be distinguished because this task is so fully performed by the opinion in the *Netzer Case* cited at p. 20 above.

The trial court's opinion, denying appellant's motion for a new trial, relies on the *Texas & P. Ry. Co. v. Rigsby*, 241 US 33, 60 L ed. 874 (1915). The case is distinguished in several of the cases cited herein[11] and its findings limited by the holding in *Tipton v. Atchison, T. & S. Fe Ry. Co.*, supra (see footnote 2 above).

The following additional distinguishing features are apparent. In the *Rigsby Case* the car had not reached the repair tracks at the time of the accident, not only was it switched over a mainline track but was left standing upon the mainline and so switched and so standing endangered interstate train operations. The trial court felt there should be no difference between the two cases. The case is one in which the involved car had not as yet been removed from service, it was still in use, it bore the same relationship to trains operating on the main tracks as it would have borne had it been in an interstate train.

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11. *Lyle v. Atchison T. & S. F. Ry. Co.*, supra; *Kaminski v. Chicago M., St. P. & P. R. Co.*, supra; *Netzer v. N. P. Ry. Co.*, supra.

THE VERDICT IS EXCESSIVE

In a case which, on its facts, is proper for the exercise of the power, this court has the power to give relief if an award of damages is excessive as a matter of law or is the result of passion and prejudice. (*Cobb v. Lepisto,* 6 F2d 128, 129 (Circ. 9); *Department of Water and Power v. Anderson,* 95 F2d 577, 586 (Circ. 9); *Southern Pacific Company v. Guthrie,* 186 F2d 926 (Circ. 9); *Covey Gas & Oil Co. v. Checketts,* 187 F2d 561 (Circ. 9).)

The court, in its order denying appellant's motion for a new trial, states (R. 16):

> "I recognize that the trial judge is not a mere arbiter but the question of the amount of damage is primarily for the jury. **While the amount of the verdict may be relatively large,** it is not so large as to shock the court's conscience or sense of justice. It will not be set aside."

For clarity in understanding the medical testimony the following significant facts are set forth in chronological order:

Injury	September 15, 1952	
Return to work	November 18, 1952	(R. 47)
Felt pain in groin	May, 1953	(R. 50)
Back re-injured (laid off work)	September 22, 1953	(R. 50)
Examined by Dr. Fisher	October 23, 1953	(R. 61)
(No hernia present on that date (R. 82))		
(Recommended treatment back brace (R. 72))		
Hernia operation	December, 1953	(R. 50)
Return to work	February 1, 1954	(R. 51)
Examined by Dr. Fisher	August 10, 1954	(R. 72)
(Not wearing back brace as recommended (R. 81))		
Examined by Dr. Sheppard	August 10, 1954	(R. 140)
Examined by Dr. Fisher	October 28, 1954	(R. 78)

(On November 22, 1954 appellee testified he was wearing back brace which had been prescribed by Dr. Fisher approximately six weeks before the trial (R. 55) the brace must have been perscribed by the doctor on October 28, 1954, less than one month before the trial.)

Two doctors testified to the medical facts in this case. Dr. Fisher who treated the appellee (R. 55) appeared and testified on his behalf. Dr. Sheppard, who examined on behalf of the appellant, appeared and testified. Dr. Fisher diagnosed appellee's condition as an acute neck strain, bilateral parascapular strain and a strain of the low back (R. 69). Dr. Sheppard's diagnosis was a bruising of the musculature of the back (R. 147 ff). Each of the doctors testified that their x-ray examinations were negative (Fisher R. 82, Sheppard R. 142 ff), that back motion was within normal range (Fisher R. 83, Sheppard R. 142), neurological examination essentially negative (Fisher R. 82, Sheppard R. 144), and that reflexes were normal (Fisher R. 83, Sheppard R. 143).

Appellee did not receive any treatment by a doctor for his back condition from the time he returned to duty on November 18, 1952, until the date of the second injury on September 22, 1953 (Blazin R. 48, 49). The testimony of Dr. Fisher in connection with the second injury is significant.

"Q. Now, Doctor, from your examination and from the history, in your opinion is there any connection in the complaints that he complained to you about here, on August 10th, that you would relate it to the accident that he had in September of '52?

A. Yes, I believe that they resulted from that accident and also this **re-injury of his upper back in November of '53,** I believe it was."

This action is solely for injuries sustained on September 15, 1952, the term "re-injury" does not mean exacerbation but to "injure over again."

The verdict is for $23,050. It was awarded to a 29-year-old yardman. He worked for two days following the accident and was then off work for a period of two months. During this time off he was paid for a two-week vacation. He then worked for a period of some ten months and on September 23, 1953, he was involved in an accident throwing a switch following which he remained off work until February 1, 1954, a total of four months and eight days. During this period of disability he was paid for a two week vacation and was operated on for a hernia. The hernia could not possibly have come from the accident here sued on. Plaintiff testifies that he felt a tingling sensation in his groin in May of 1953 when he got off a car (R. 50) and the hernia was not present when Dr. Fisher examined the plaintiff in October of 1953 (R. 82). Assuming that all of plaintiff's disability is chargeable to the accident he lost only a total of 2 months in the first instance and 4 months and 8 days in the second instance, or a total of 6 months and 8 days. True, plaintiff testified that he had lost some time between his return to duty on November 18, 1952, and the accident of September 22, 1953. Defendant's Exhibit "H" in evidence indicates that there was a total of 309 working days from November 18, 1952, through September 22, 1953. Under union contract yardmen were working a five day week (R. 134). In this period of time Mr. Blazin worked a total of 246 days. This was a period of time amounting to 44 weeks. Had he worked only five days a week he would have worked 220 days and been off work 88 days. Of this total time off, ten to fifteen days was taken off for personal reasons and not due to physical condition (R. 58). Plaintiff lost in wages during the six and one-half months off work a gross of $2,795.00

and a net of $2,275.00 (R. 47). In addition, plaintiff had medical expense for supplies and medication of $29.00 (R. 53) and for treatment to Dr. Fisher, $27.50 (R. 80). The total special damages would, therefore, be a gross of about $2,850.00 or a net of about $2,230.00. By this verdict plaintiff would be paid $20,200 in excess of his specials for intangible items not supported by the evidence herein. **There is no testimony in the record from the plaintiff or the doctors who appeared indicating any future work disability.** There is no testimony of probative certainty that there will be any future medical expense, nor is there testimony indicating that there will be any future loss of earnings or earning power.

CONCLUSION

It is respectfully submitted that the judgment must be reversed.

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